



DEPARTMENT OF JUSTICE

Remarks Regarding the Antitrust Division's Closing of its Review of the ASCAP and BMI Consent Decrees

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The Antitrust Division today released a statement concerning our investigation into potential modifications to the ASCAP and BMI consent decrees. These decrees have been in place since 1941, when the Department of Justice reached settlements with both ASCAP and BMI that resolved antitrust lawsuits related to those organizations' joint licensing of competing songs. The consent decrees were designed to preserve the procompetitive benefits of joint licensing while at the same time protecting against the anticompetitive potential inherent in such agreements among competitors.

After a lengthy investigation, we have determined that it is not appropriate to seek modification of the consent decrees at this time. While much has changed in the music industry since the consent decrees were established in 1941, they remain at the core of how performance rights have been and will continue to be licensed; these decrees enable businesses to access music efficiently and ensure that songwriters are compensated for their creative work. We believe that pursuing the requested modifications at this time would disrupt the status quo, would not be consistent with the purposes of the consent decrees, and would not be in the interest of consumers.

We do believe it is important, however, to provide our interpretation of the meaning of the licenses required by the decrees. We did not set out to address this question as part of our review, but were informed by stakeholders that, once this question was raised, our failure to resolve it would lead to significant uncertainty in the industry. Since the blanket license is a central component of the licensing framework established by the decrees, and is relied upon by songwriters and users alike for the effective functioning of performance rights licensing by ASCAP and BMI, ensuring clarity regarding its scope became an important goal of our review. This interpretation should not significantly change the status quo in music licensing. Indeed, it

is consistent with how the industry has effectively been operating for many years. Our purpose in stating our views publicly is simply to make clear what the consent decrees have always required so that any practices that have developed that are inconsistent with those requirements can be adjusted accordingly.

We opened the current investigation in 2014 after ASCAP and BMI requested that we consider various proposals to modify the consent decrees, including, most prominently, that they be permitted to allow large music publishers to “partially withdraw” their songs from ASCAP and BMI for purposes of licensing to digital music services such as Pandora or Spotify. As our investigation proceeded, we discovered that there was significant disagreement in the industry about what rights must be conveyed by the blanket licenses (as well as other categories of licenses) that the consent decrees require ASCAP and BMI to offer. Some argued that, in order to effectuate the purpose of the consent decrees, the blanket license must grant licensees (also called “users”) the right to publicly perform all songs in the ASCAP and BMI repertoires. Others believe that the blanket licenses offered by ASCAP and BMI instead confer only rights to the fractional interests in songs owned by ASCAP’s and BMI’s members and that music users must obtain separate licenses to the remaining fractional interests before playing the songs.

As the Division considered the original requests to modify the consent decrees to permit partial withdrawal, we realized that we could not assess the likely impact of the proposal without first understanding precisely what is granted by the PROs’ licenses. Consider a song with multiple co-authors where all the authors belong to the same PRO. What would happen in the event that a publisher that controlled some, but not all, of that song’s authors’ interests withdrew digital rights from the PRO? What rights would the publisher withdraw? What

rights would be left in the PRO? Would the blanket license still offer the right to play that song since some of its authors would remain in the PRO? Thus, the question of what the consent decrees require of ASCAP and BMI became a necessary step in considering any modifications.

In the end, the Division concluded that only full-work licenses could fulfill the purpose and meaning of the requirement in the consent decrees that ASCAP and BMI offer blanket licenses that provide users the ability to play all the songs in the PROs' repertoires. Importantly, this does not mean that ASCAP and BMI are required to provide a full-work license to a work when their members cannot grant them the ability to offer such a license. That is, we do not suggest an interpretation of the blanket license that is inconsistent with the Copyright Act. Rather, if the members of ASCAP or BMI are unable to grant to their PRO the rights to license their works on a full-work basis, those works are ineligible for licensing by ASCAP or BMI.

Both sides in this debate pointed to past practices they believed supported their view of whether ASCAP and BMI licenses were full-work or fractional. We think the evidence favors the full-work side. Our determination begins with the language of the consent decrees themselves, which unambiguously require ASCAP and BMI to offer licenses to all works or compositions in their repertoires, and not to interests in works. For example, in the case of ASCAP, it must provide a license to perform "all of the works in the ASCAP repertory."

Our view is also based on what is required for all participants in the industry to enjoy the substantial procompetitive benefits of the PROs' blanket licenses – benefits that differentiate the PROs from joint price-setting entities that often present significant problems under the antitrust laws. The Supreme Court described blanket licenses in the BMI case as providing "unplanned, rapid, and indemnified access" to the songs in the PROs repertoires. Fractional

licenses would not offer the benefits the Supreme Court described.

A full-work blanket license from ASCAP or BMI allows the music user to publicly perform, without risk of copyright infringement liability, all works in the licensing PRO's repertory. Particularly for music users – such as bars and restaurants – that cannot meaningfully control in advance the music they play in public, this feature of the PROs' licenses benefits both the licensees as well as music creators in that it ensures that users can and will continue to play the creators' music.

Fractional licensing would not offer the same benefits to users. If a PRO's license granted a user something less than a license to play a particular song, music users seeking to avoid infringement liability would face the daunting task of identifying and ensuring they obtained licenses from all fractional owners – a challenge made more difficult by the lack of a comprehensive, reliable, and transparent catalog of rights. Under those conditions, even music users with control over the music they perform would have to curtail their performance of music until they were certain they had obtained licenses from all fractional owners. As BMI itself argued in a recent rate-court filing, a BMI license grants to a music user “insurance against copyright infringement . . . and immediate access to more than 10.5 million works in BMI's repertoire.” A fractional license could not provide these benefits.

Industry participants have raised a number of concerns about how full-work licensing might impact the current music-licensing landscape. Songwriters, in particular, have expressed concerns about their ability to continue to collaborate with members of other PROs if ASCAP and BMI grant full-work licenses. This is based on a concern that users would go to only one PRO to get access to songs that have multiple owners. The Division understands these concerns but believes that there are facts that reduce the likelihood that music users will engage

in this sort of gamesmanship. Virtually all significant music users today obtain licenses from both ASCAP and BMI (as well as from at least one other PRO, SESAC). Users will continue to have every incentive to license from both ASCAP and BMI since they each already hold 100 percent interests in a sufficient number of works that licensees will continue to regard the infringement protections offered by each PRO's license to be essential.

As music users continue the practice of obtaining licenses from both ASCAP and BMI, nothing will stop them from continuing the practice commonly used today in the industry of paying each PRO based on the fractional interests in songs controlled by the PRO's members. Again, based on the Division's investigation, we see no reason why today's full-work licensing but fractional payments practice cannot continue into the future – with each songwriter continuing to be paid by the PRO with which he or she has affiliated. In the unlikely event that a user obtains a license from only one PRO, that PRO would have reason to increase the rate for the license to account for the full share of all the songs it licenses (rather than according to the shares on which the license fee is normally calculated).

Songwriters have also expressed a concern that if ASCAP and BMI must offer full-work licenses, the PROs will reduce the prices of their licenses (and thus the amounts the PROs remit to their songwriter members) in order to attract significant music users. We think this is unlikely, particularly in a world in which music users continue to need licenses from both ASCAP and BMI, because a PRO that reduced its licensing fees would risk losing members to other PROs.

Others have expressed concern that our interpretation will cause many works to become unavailable through the PRO licenses. It is true that the decrees' full-work licensing requirement prevents ASCAP and BMI from including in their blanket licenses any songs they

cannot offer to users on a full-work basis. However, the default position under U.S. copyright law allows any individual co-owner of a work to license the entire work on a nonexclusive basis. Therefore, many jointly owned works in ASCAP's and BMI's repertoires can be licensed on a full-work basis. Indeed, songwriter members of both ASCAP and BMI expressly granted to the PROs the right to license songs in which the member was contributing only a fractional interest.

The Division understands that, in some instances, songwriters may have entered into contracts that prevent a single co-writer from licensing a co-written song on a full-work basis. In those instances, songwriters that want their songs to be included in the PROs' blanket licenses can renegotiate their songwriting arrangements to achieve that goal. In order to allow ASCAP and BMI time to work with their members to identify the songs that cannot be included in their repertoires and to allow songwriters to determine whether they want their songs licensable through ASCAP and BMI (and to adjust their relationships accordingly), for the next year the Division will not seek to have the ASCAP or BMI rate courts enforce the full-work licensing requirement.

While the Division has at this time decided that it will not pursue any of the proposed modifications to the consent decrees, we have not ruled out the possibility of pursuing modifications, including to allow for partial withdrawal, sometime down the road. At this time, we believe it important that ASCAP, BMI, and other stakeholders work to continue the successful existing licensing practices taking into account the Division's views on the consent decrees' requirements regarding blanket licenses.